No. 79-2059

IN THE

Supreme Court of the United States

October Term, 1979

AMERICAN ELECTRIC POWER COMPANY, INC.,
AMERICAN ELECTRIC POWER SERVICE CORPORATION, and
INDIANA & MICHIGAN ELECTRIC COMPANY,
Corporations,

Petitioners,

v.

CITY OF MISHAWAKA, INDIANA,
CITY OF NILES, MICHIGAN,
CITY OF COLUMBIA CITY, INDIANA,
CITY OF BLUFFTON, INDIANA,
CITY OF GARRETT, INDIANA,
CITY OF GAS CITY, INDIANA,
TOWN OF FRANKTON, INDIANA,
TOWN OF WARREN, INDIANA,
TOWN OF NEW CARLISLE, INDIANA, and
TOWN OF AVILLA, INDIANA,
Municipal Corporations,

Respondents.

PETITIONERS' BRIEF IN RESPONSE TO THE BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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December 31, 1980

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Pursuant to Rule 24(5) of this Court, Petitioners file this Supplemental Brief in support of their Petition for a Writ of Certiorari to the United States Court of Appeals

for the Seventh Circuit and in response to the Brief for the United States and the Federal Energy Regulatory Commission as Amici Curiae ("Amici's Brief"), filed on December 15, 1980.*

Discussion

The ultimate question presented by this Petition is whether trials of Section 2 cases in the federal courts furnish the appropriate theatre for the resolution of disputes over electric rates regulated by federal and state agencies. This Petition urges review of the first appellate decision to superimpose monopoly principles on such regulated electric rates, and of the conflicts, incongruities and inconsistencies engendered by the invocation of antitrust formulae in collateral review of administrative determinations. The Amici's Brief surprisingly argues that "settled principles" of antitrust law are fully appropriate to resolve electric rate disputes, that the decision below was in accord with such settled principles, and that review is therefore unnecessary. The imprimatur of the government on the procedures employed and the doctrines created in the decision below underlines the urgency of review by this Court.

The fundamental issue of whether the reach of the antitrust laws extends to regulated electric rates was left undecided by this Court's four-to-three decision in *Otter Tail Power Co.* v. *United States,* 410 U.S. 366 (1973);** and

* The information required by this Court's Rule 28.1 appears in the Appendix to this Brief.

** While the utility in *Otter Tail* was required to furnish "wheeling" services to a competitor, the decree directed that such service be paid for at a compensatory rate to be fixed by the Federal Commission. 410 U.S. at 375-77.

in *FPC* v. *Conway Corp.*, 426 U.S. 271 (1976), this Court held that the Federal Commission had jurisdiction to (and must) consider "price squeeze" allegations as part of the administrative process. It is therefore far from settled law that an award of antitrust damages for a "monopolistic overcharge" or "price squeeze" claim may be predicated on regulated electric rates, or on petitions for changes in such rates or on the grant or denial of such petitions. Indeed, the imposition of any award of antitrust damages, large or small, effects a reduction, by indirection, in the rates determined by the regulatory bodies, and thus conflicts with the "filed rate" doctrine emphatically articulated by this Court:

> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, *whether fixed or merely accepted by the Commission,* and not even a court can authorize commerce in the commodity on other terms.

Montana-Dakota Utilities Co. v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (emphasis added); *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 162 (1922).

The Seventh Circuit did not find "settled principles" at hand to deal with this case. To the contrary, the Seventh Circuit conceded that multiple regulation of a utility by federal and state regulatory agencies and by the Sherman Act "generates legal and practical problems in addition

to electricity'' (Pet. App. 8a) and that, ''[a]t best,'' a utility subject to three overlapping schema of regulation ''may find itself in a legal and practical maze, . . .'' (Pet. App. 18a). The decision below found that existing principles were inadequate to guide the courts through the legal maze: ''The necessary resolution by the courts of the involved complexities does not render a totally satisfying result.'' Pet. App. 8a.

To the extent that any settled principles were available, they were to be found in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), *Keogh* v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156 (1922), and *Bluefield Water Works & Improvement Co.* v. *Public Service Commission*, 262 U.S. 679 (1923). The Seventh Circuit was compelled to chart new paths largely because it failed to follow these cases or even to recognize that they are guideposts as applicable to antitrust as to other claims.

On the *Noerr-Pennington* issue, the Amici's Brief construes the decision below as holding that the doctrine is simply inapplicable to rate relief filings made under a statute that provides for the collection of requested rates subject to refund. Amici's Br. 8-9. The Amici's Brief argues (at 8) that, while the First Amendment right of petition may be ''implicated ultimately,'' it does not protect the petitioning process itself; we would have thought, however, that the very first utterance, the lodging of the petition for rate relief, would be the protected act to which the constitutional right would have attached. It is impossible to divine from the Amici's Brief what event other

than the filing of the petition would awaken the constitutional protection of the *Noerr-Pennington* doctrine.*

The Amici's *Noerr-Pennington* analysis contradicts the holding below that I&M's filings were non-sham petitions to government within the meaning of the *Noerr-Pennington* doctrine (Pet. App. 13a); the Seventh Circuit nevertheless declined to dismiss on that ground because it held that the doctrine is inapplicable in a context of other exclusionary acts (Pet. App. 17a), a holding which is contrary to this Court's expressed view in *United Mine Workers* v. *Pennington,* 381 U.S. 657, 670 (1965). To support the result reached below, the Amici were compelled to remove rate filing petitions from the protective mantle of *Noerr-Pennington,* even though the exercise of the right of petition in the electric utility industry is the sole permissible avenue for securing a utility's Fifth Amendment right to a fair return on investment. *See Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923). Since the application of the *Noerr-Pennington* doctrine would mandate dismissal of the decision below, the abatement of the very Constitutional rights that the doctrine protects becomes an indispensable preliminary to the Amici's consideration of the further holdings below.

In this action, it is conceded that I&M sought the full rate relief that it believed it could justify under the applicable regulatory rules. Pet. App. 119-20a (Finding 32). There is no finding and no claim that I&M sought any more. Yet the Seventh Circuit and the Amici conclude that a

* The Amici's discussion of the *Noerr-Pennington* doctrine (at 8) turns on a distinction between "private action" and government action which is inappropriately borrowed from and confused with the "state action" analysis under *Parker* v. *Brown,* 317 U.S. 341 (1943).

specific anticompetitive intent may be derived from such rate filings and that such an intent mandates liability.

That finding of specific intent originated in the district court's blanket adoption (and photocopying) of Respondent's proposed findings. *See Pet.* 9n. That harsh and epithetical condemnation led the Court of Appeals to create a new exception to this Court's *Noerr-Pennington* doctrine and to announce new and unprecedented antitrust rulings, and continues to cloud the novel legal issues which we submit are generally applicable to the electric utility industry. Thus, the Amici would sanction the denial of *Noerr-Pennington* protection and the dismantling of the filed rate doctrine (under *Keogh* and *Montana-Dakota*) in order to sustain liability. Neither doctrine is amenable to such abbreviation, and I&M's intent or motivation should not be determinative of their validity or applicability.

One overriding consideration is entirely omitted from the Amici's attack on the Petition. Under the decision below, every time an electric utility petitions the Federal Commission for what it believes to be the maximum amount to which it is entitled under the Federal Power Act, and every time the proposed rate schedules become effective subject to refund (pursuant to Section 205 of the Federal Power Act), the risk arises that any amount disallowed by the Federal Commission, and refunded, will be labeled a "monopolistic overcharge", thus furnishing a predicate for possible antitrust liability.* Such liability attaches,

* That holding is central because (a) the sole evidence of any "price squeeze" is a rate comparison that the Seventh Circuit held inadequate even to support a rational damage calculation (*see* Pet. at 27); (b) the courts below found that I&M's rate petitions requested no more than it believed it could justify under the applicable rules and regulations (Pet. App. 119-20a); and (c) the "[a]nticom-

(footnote continued on next page)

under the decision below, even though the utility charged only the "filed rate" within the meaning of *Montana-Dakota* and *Keogh,* and even though the rate filed represented no more than what the utility believed it could justify under the applicable regulations. The Amici's Brief addresses neither the foundation for such a result nor its significance.

The impact of these doctrines on the electric utility industry cannot be blunted, as the Amici attempt, by characterizing the fact pattern in this case as unique. The findings cited as grounds for distinguishing this case from others furnish no obstacle to the litigation of rate levels in antitrust courts whenever utility customers are dissatisfied with the statutory structure, the pace or the result of the administrative process. The finding "that I&M possessed monopoly power" (Amici's Br. 11-12) does not furnish a promising ground for distinguishing cases in this industry; I&M is no more or less a "monopolist" than any other electric utility. The Amici also rely (at 12) on the finding of other "exclusionary" acts, not in themselves violative of any statute and each in turn subject to government regulation (Pet. 10-11); that finding, by its very vagueness, represents an incitement to litigation rather than a ground for distinction. Certainly, the arguments that I&M knew that

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petitive effects from [a substantial] portion of the price squeeze, absent evidence that [I&M] deliberately depressed its [state-regulated] retail rates, must be attributed to the state regulatory commissions and not to the utility." Pet. App. 28a n. 16.

Those findings are flatly incompatible with the Amici's assertion that this case rests on "I&M's manipulation of its wholesale and retail rates" (Amici's Br. 10) and with the argument that the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943) does not preclude liability on the "price squeeze" claim (Amici's Br. 10-11). Moreover, the Amici's present argument on *Parker* v. *Brown* can scarcely be said to reflect "settled principles" when it is incompatible with the views advocated in the Brief for the United States submitted in connection with I&M's 1977 Petition. *See* Pet. 26-27.

its petitions to the Federal Commission would encounter delays and hoped that its petitions would be granted in full (Amici's Br. at 7-8) provide neither a ground for distinguishing this case from any other, nor a legitimate basis for the imposition of liability in the first place.

The Amici's hope that other courts will be "perceptive" enough to ignore this case as one resting on its own unique facts (Amici's Br. at 12) casts a strange light on the argument that this case applies "settled principles". No such factual distinction was drawn in *City of Groton* v. *Connecticut Light & Power Co.*, No. 15,609 (D. Conn. Aug. 26, 1980), furnished to the Court in Petitioners' Supplemental Brief; indeed, the holding of that case would compel dismissal of this case:

> The municipalities had no legal right to receive any rate other than the rate on file with the Commission. Since they received the legal rate, they, like the carrier in *Keogh* [v. *Chicago & Northwestern Railway Co.*, 260 U.S. 156, 162 (1922)] were not injured in their business or property. Absent such an injury they have no right of action for relief.

Pet. Supp. Br. 19SA. *See Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 251 (1951) (Jackson, J.). The dismissal in *City of Groton* thus rests on a settled principle at war with the views of the Seventh Circuit and the Amici. *See* Pet. 20-21.

This Petition assembles numerous issues important to the electric utility industry as a whole, as well as to the sound and efficient administration of justice. The many district courts confronting similar complex cases have at present no substantial guidance for the application—resolution, in the context of electric rates—of the exclusive jur-

isdiction issue under *Gordon* v. *New York Stock Exchange,* 422 U.S. 659 (1975), and *United States* v. *National Association of Securities Dealers,* 422 U.S. 694 (1975); of the First Amendment doctrine enunciated in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.,* 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965); of the filed rate doctrine embodied in *Keogh* v. *Chicago & Northwestern Railway Co.,* 260 U.S. 156 (1922), and *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246 (1951); of the constitutional right to a fair return on investment under *Bluefield Water Works & Improvement Co.* v. *Public Service Commission,* 262 U.S. 679 (1923); and of the state action doctrine of *Parker* v. *Brown,* 317 U.S. 341 (1943). The decision below cannot survive a ruling by this Court that any one of these principles is applicable to the electric rate filings and administrative determinations that are at the core of this case.

Conclusion

Based on all the foregoing, Petitioners respectfully pray that their Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit be granted. Nothing in the Amici's Brief casts doubt upon the importance of the exercise of this Court's supervisory power over this case.

Respectfully submitted,

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APPENDIX

Appendix

Parent:* American Electric Power Company, Inc.

Affiliates and Subsidiaries:

*American Electric Power Service Corporation
Appalachian Power Company
Beech Bottom Power Company
Blackhawk Coal Company
Cardinal Operating Company
Cedal Coal Co.
Central Appalachian Coal Company
Central Coal Company
Central Ohio Coal Company
Central Operating Company
Columbus and Southern Ohio Electric Company
Franklin Real Estate Company
Indiana Franklin Realty, Inc.
Indiana-Kentucky Electric Corporation
*Indiana & Michigan Electric Company
Kanawha Valley Power Company
Kentucky Power Company
Kingsport Power Company
Michigan Electric Power Company
(Formerly Sewell Valley Utilities Co.)
Michigan Gas Exploration Company
Michigan Power Company
Ohio Power Company
Ohio Valley Electric Corporation
Price River Coal Company, Inc.
(Formerly Castlegate Coal Company, Inc.)
Southern Appalachian Coal Company
Southern Ohio Coal Company
(Formerly Captina Operating Company)
Twin Branch Railroad Company
West Virginia Power Company
Wheeling Electric Company
Windsor Power House Coal Company

* Petitioners.